The Statutes of the State of Kansas involved are K.S.A. 68-1901 to 68-1906, inclusive. These statutes are set out in full in Appendix B to this Petition. Of particular significance, however, is K.S.A. 68-1903, as follows:

> "*Acquisition of property and property rights.* The highway authorities, jointly or severally, may acquire the desired private or public property, including rights of access, light, air or view for controlled access facilities, by gift, devise, purchase or condemnation, in the same manner as now or hereafter authorized by law for acquiring property or property rights in connection with highways, roads and streets within their respective jurisdictions. [L. 1953, ch. 307, §3; April 2.]"

STATEMENT

The petitioners, husband and wife, now own and at all times material have owned real property on the north side of U.S. Highway 54 west of the City of Wichita, Kansas, in its urban area. The land was platted, but undeveloped valuable commercial property. In 1953 the State Highway Commission of Kansas had built a divided concrete four-lane highway abutting the entire south boundary of petitioners' land. The Highway Commission had previously in 1952 condemned the right of way, but no attempt had been made to condemn access rights and the condemnation action was before the Highway Commission secured the power to condemn access by the statutes now known as K.S.A. 68-1901 to 1906, inclusive (Appendix B). Although the physical construction of driveways from the land to the highway was, as is customary, waiting the actual commercial development of the land, the landowners for some six years after the construction of the highway in 1953 had and enjoyed free, unlimited and unrestricted direct access to the highway.

In 1959, without condemnation of access rights and without affording petitioners an opportunity to be heard on the extent of damage to petitioners' property or the reasonableness of proposed indirect access, and without any hearing or determination of necessity, the State Highway Commission of the State of Kansas built on its right of way a service or frontage road across the entire south boundary of landowners' property. This was built between the existing highway and the petitioners' property and it served as a permanent barrier eliminating and preventing direct access from the highway to said commercial property. The length of frontage of petitioners' property is 197.88 feet. There are no entrances or points of connection at any point along the frontage of petitioners' property with the main travelled portion of the highway. The points of connection between the frontage road and the main travelled portion of the highway at the time of the argument of this case to the Kansas Supreme Court were 1,067.44 feet apart. The one to the east of petitioners' property being 155.56 feet east of the east boundary of petitioners' property and the one to the west being 714 feet west of the west boundary of petitioners' property. (The above mentioned measurements were not before the District Court when it rendered summary judgment against petitioners and were only brought out on second argument of this case before the Supreme Court of Kansas.)

This frontage road to control access to existing Highway 54 was built without any condemnation at any time of the right of access and without the payment of any compensation. Thereafter petitioners brought action in the District Court of Shawnee County, Kansas, and, relying on past decisions of the Kansas Supreme Court, claimed the right to be compensated for the fair and reasonable value of the property rights taken by the State Highway Commission. Such petition specifically claimed:

"That the defendant has not instituted any action to condemn said property rights, but has appropriated said rights without due process of law and without payment of just compensation and without payment of any compensation. That said appropriation of said rights constitutes a taking of property rights in violation of the Laws of the State of Kansas and the Constitution of the United States." (Petition, Paragraph No. 6).

By amendment to the petition, petitioners alleged that the State Highway Commission had been engaged in the process of constructing and maintaining identical service roads on the same highway in the Wichita Metropolitan area after the taking of property rights identical to that involved herein by condemnation and payment of just compensation, but that the defendant Highway Commission "refused to afford these petitioners equal protection of the law, procedural due process and has failed, refused and neglected to make payment to these plaintiffs for the said taking of any compensation and has failed to make payment of just compensation." (Amendment to Petition, Paragraph No. 2). Defendant Highway Commission filed its answer claiming that the construction of the frontage road and the cutting off of direct access of petitioners was "to promote the public safety and welfare, to best serve the traffic along said highway, and in the exercise of its power to regulate and control highway traffic and access to highways. . . ." (Answer, Paragraph No. 5). At no time has the defendant Highway Commission claimed that the petitioners have not been damaged or that the petitioners' right of direct access to the main travelled portion of the highway has not been cut off. After the filing of the appropriate pleadings and certain requests for admission were obtained, but before the presentation of any evidence, defendant Highway Com-

mission filed a Motion for Summary Judgment which, on the 28th day of September, 1964, was sustained by the District Court on the ground that any control of access was within the police power properly exercised by the Highway Commission and that there was no compensable injury to the petitioners.

The matter was appealed to the Supreme Court of the State of Kansas and the petitioners again raised the questions of procedural due process, payment of just compensation and equal protection of the laws (Statement of Points Nos. 2, 3, 4 and 7 in the Supreme Court of the State of Kansas; also in Brief, Issues Presented Nos. 1, 2, 3, 4, 5 and 6). Subsequent to the filing of the record on appeal and the brief of these petitioners on appeal in the Kansas Supreme Court, that court issued an opinion in the case of *Brock* v. *State Highway Commission of Kansas,* 195 Kan. 361, 404 P.2d 934, which opinion stated a radical departure from the established law of Kansas in that it purported to lend a new statutory construction to Kansas Statutes K.S.A. 68-1901 to 1906, inclusive, substituted social and economic concepts for the judgment of the legislature and determined exercise of the police power and indirect access to be a question for the court rather than jury. Thereupon these petitioners filed a supplemental brief in which issues were presented in addition to those already mentioned above, as follows:

> "1. Shall the appellants' private property rights be appropriated without just compensation by deprivation by judicial legislation under the guise of statutory construction?
>
> "2. Shall appellants suffer the taking of private property rights by the substitution of social and economic concepts of the Supreme Court of Kansas for and in place of the considered judgment of the legislature of the State of Kansas?

"3. Shall the appellants be deprived of the right of trial by jury?"

Prior to the opinion of the Kansas Supreme Court in the Brock case and prior to the filing of petitioners' supplemental brief, the Supreme Court of Kansas had heard oral arguments in this case, but after the filing of the Brock decision, the court called for a new oral argument preparatory to which the petitioners filed the supplemental brief referred to above. After the second oral argument in the case, the Supreme Court of the State of Kansas issued its opinion which held that when a frontage road is provided to which the abutting owners of property have direct access and they have reasonable access from the abutting property via the frontage road to the through traffic lanes, the abutters' right of access has not been taken or appropriated by the State Highway Commission, but merely subjected to regulation under the police power of the state and their damages, if any, are noncompensable. Further the court went on to hold that under the facts of record in this particular case the abutting property owners have reasonable access from their property to the controlled access highway and their rights of access have not been taken or appropriated by the State Highway Commission, but merely subjected to regulation under the police power of the state and their damages, if any, are noncompensable.

These petitioners filed a Motion for Rehearing and in said Motion for Rehearing petitioners reiterated their claim of violation of rights, privileges and immunities under the United States Constitution inter alia as follows:

"The opinion and decision of this Court in this matter has deprived these appellants of property and property rights without due process of law in violation of the

Fourteenth Amendment of the Constitution of the United States. The executive branch of the State of Kansas, acting through the State Highway Commission of Kansas, has taken vested rights of abutter's access of substantial value, owned by the appellants without condemnation and without following established legal procedures of any kind, and without just compensation; and this taking has now been confirmed by this Court."

* * *

"The thrust and effect of the trial Court summary judgment was that the Highway Commission, without limitation, can destroy property values and take valuable property rights without limitation or restriction, so long as the Highway Commission urges that the label 'police power' be applied to their act. This, a trial Court located some 150 miles away from the property in question, who cannot be presumed to have knowledge, or to have taken any judicial notice of the geography, surroundings, or circumstances of the property in question, without a trial and without the presentation of any evidence. Thus, the trial Court approves carte blanche power in the Highway Commission to take; without affording appellants a right to be heard, and a right to have their day in court in either administrative or judicial proceedings."

* * *

"As was pointed out in the appellants' amendment to petition, Record pg. 6, the State Highway Commission was and had been engaged in the process of constructing and maintaining frontage roads on the same highway under substantially identical circumstances, proceeding by condemnation and the payment in said cases of just compensation. The State Highway Commission of Kansas refused to condemn the rights here in question, and proceeded to take the right of access of the appellants—not by condemnation, but by appropriation. This Court is holding, in substance, that the existence of a landowner's rights may be determined by the whim of an administrative agency. The State Highway Com-

mission is to be required to pay just compensation when it condemns. It may take substantially identical rights by appropriation without payment of just compensation. This is the refusal to grant these appellants equal protection of the laws as required by the First (sic) Amendment of the Constitution of the United States."

* * *

"To finally deny to the citizens of Kansas the same constitutional protection of their private property rights is a denial to the citizens of Kansas and to these appellants, of equal protection of the laws, and a denial of a uniform construction and application of the United States Constitution."

On February 23, 1966, the Supreme Court of the State of Kansas overruled petitioners' Motion for Rehearing.

Petitioners' request that this court take jurisdiction of this case is for the purpose of determining the rights, privileges and immunities of these petitioners under the Constitution of the United States and more particularly, their rights to equal protection of the laws, payment of just compensation for property taken by administrative fiat of the State of Kansas, procedural due process and trial by jury.

REASONS FOR GRANTING THE WRIT

I

As the number of motor vehicles increases, our population becomes more mobile and more free time leads to increased highway travel, the emphasis on major highways has swung from the land service highway to the concept of the super non-access interstate highway at the other extreme and the hybrid version of the super highway which is characterized by the local service or frontage road separated from the high speed traffic lanes. Perhaps

no concept in transportation history has engendered such a flood of litigation and diversity of results as the concept of "indirect access" to an existing highway. The petitioners believe that the time has come for this court to express for the guidance of all its interpretation of the safeguards and rights guaranteed to the citizens of the several states, as these relate to the valuable property right known as direct access rights.

As Justice Schroeder pointed out in his dissent in the case of *Brock* v. *State Highway Commission, supra,* 195 Kan. 361, 377:

> "Cases in other jurisdictions as to whether the landowners of property abutting a frontage road should be compensated or not for loss of direct access fall into three major categories:
>
> (1) Any loss resulting from being placed on a frontage road should be compensated in eminent domain, but the existence of the frontage road should be considered in mitigation of the loss suffered.
>
> (2) Any loss resulting from being placed on a frontage road should be compensated in eminent domain only where accompanied by an otherwise compensable taking of land, and the existence of a frontage road should be considered in mitigation of the loss suffered in those cases.
>
> (3) Any loss resulting from being placed on the frontage road should not be compensated in eminent domain whether land is taken or not.

The court in the instant case has done an about-face by jumping from position No. 1 (supported in *Franks* v. *State Highway Commission, supra*; *Atkinson* v. *State Highway Commission, supra*; and *Smith* v. *State Highway Commission, supra*) to position

No. 3, subject, however, to the qualification that the restriction of access to the abutting property owner by the State Highway Commission must be reasonable. This switch has been accomplished in spite of a statute which defines the state's policy on frontage roads."

Cases relating to each of the above three described concepts can be found in the Annotation 43 A.L.R. 2d 1072, 1077-1079, and A.L.R. 2d Later Case Service, Vol. 4, pp. 904-909.

Examples of cases recognizing the right of direct access as a constitutionally protected right (often called the majority rule) are:

People v. *Ricciardi*, 23 Cal. 2d 390, 144 P.2d 799;
State v. *Thelberg*, 87 Ariz. 318, 350 P.2d 988;
State v. *Geiger & Peters, Inc.*, (Ind.) 196 N.E.2d 740;
Balog v. *State Dept. of Roads*, 177 Neb. 826, 131 N.W.2d 402.

An example of a case seeming to recognize the preeminence of the "police power" over the right of direct access is:

Nick v. *State Highway Com.*, 13 Wis. 2d 511, 109 N.W.2d 711.

A reading of all of the cases of the various states discloses that invariably the constitutional prohibition against taking of property without just compensation and the requirement of due process is constantly being urged on the highest courts of the various states with reference to these access cases and continually the highest courts of these states are ruling one way or the other on these substantial questions arising under the Constitution of the United States. It would serve no useful purpose at this stage

of this litigation to set out the extended arguments on both sides of the question and the various reasonings of the courts in arriving at their very diverse conclusions. If the petitioners' writ is granted, such arguments and reasoning will be fully presented to this court. Suffice it to say at this time that on the particular questions involved here the citizens of the various states are being dealt with in a variety of ways, denied compensation in many courts, allowed compensation in other courts, furnished some procedural relief in other courts, completely denied even the barest of procedural hearing in other courts, and all of these various diverse treatments being rendered under the cloak of answering the question as to whether or not the U. S. Constitutional protections of due process, just compensation and equal protection of the laws grant a right and a remedy with regard to the taking of direct access to an existing highway.

Even the Kansas Supreme Court recognized the frustration of attempting to coordinate the various opinions of the several states when in *Brock* v. *State Highway Commission, supra,* 195 Kan. at page 369 the court said:

> "The courts have been in disagreement as to what constitutes undue limitations or unreasonable interference with the rights of an abutting owner. They are in even a more hopeless conflict when it comes to applying the doctrine to controlled access highways. The courts of the various jurisdictions, including our own, are not only in conflict but the judges constituting the various courts are in disagreement. It is difficult to find an opinion on the matter which is not accompanied by concurring and dissenting opinions."

This court can render a great service to the orderly administration of our judicial system in this country by taking jurisdiction of this case which squarely raises the

federal constitutional questions involved and putting to rest once and for all the indecisiveness, contradictions and unequal treatment currently afforded by the numerous decisions of the various states. As Justice Douglas said in his dissenting opinion in *Martin* v. *Creasy*, 360 U.S. 219, 227, 79 S. Ct. 1034, 1038-1039, 3 L. Ed. 2d 1186:

> "We have at bottom in this case a question whether access to a highway is a property right which is compensable under the Fifth and Fourteenth Amendments. If it is compensable, as the District Court ruled, see 160 F. Supp. 404, 410-412, this is the most appropriate time to make the announcement. Particularly is this so when appellees in this case sought a declaration by the state court of their rights under the statute and were told that 'their constitutional rights, whatever they may be, will be guarded and protected.' Such a ruling by the District Court would not halt the highway program. *But it might have an effect on engineering designs for new local service roads to provide substitute means of access to the highways; and it would make clear to the local authorities what the scope of their financial commitments in the undertaking is.*" (Emphasis supplied).

Justice cannot be served by delaying a decision of this important question any longer, even if the final determination of such question should be adverse to the contentions of these petitioners. Further delay will result in further indecision and ludicrous results.

II

The anomaly in this particular case, so far as the action of the Kansas Supreme Court is concerned, is the fact that in December of 1957 the Kansas Supreme Court construed the Kansas statutes in *Franks* v. *State Highway Commission*, 182 Kan. 131, 319 P.2d 535, holding that a landowner comparably situated could by injunction pro-

hibit the Highway Commission from limiting or controlling the landowners' rights of access to an existing highway and finding that an attempt by the State Highway Commission to limit and control access without condemnation was repugnant to the said statute. Thereafter, in *Atkinson* v. *State Highway Commission*, 184 Kan. 658, 339 P.2d 334, the Kansas Supreme Court again specifically held that the powers granted by the statute prohibited the limitation of direct access without condemnation and just compensation unless access rights were acquired as specified by the statute by gift, devise or purchase. The court there further specifically held that the legislature did not put any limit on the amount of access required to be taken before the Commission must resort to condemnation, if not acquired by gift, devise or purchase, and it held specifically that the limitation of direct access was a taking that required just compensation. The Atkinson opinion was filed by the Kansas Supreme Court on May 16, 1959, less than a month before the taking involved herein. There can be no doubt that at the time of the taking in this case the petitioners herein under the rulings of the Kansas Supreme Court owned valuable property rights and right of access. This valuable right of access has a common law origin and it was recognized by legislative sanction and protection and judicial recognition.

The police power argument made by the State Highway Commission in the court below and adopted by the Kansas Supreme Court had previously been specifically rejected in *Smith* v. *State Highway Commission*, 185 Kan. 445, 346 P.2d 259. Thereafter, however, and while this case was pending on appeal in the Kansas Supreme Court that court decided the case of *Brock* v. *State Highway Commission*, *supra*, 195 Kan. 361, 404 P.2d 934. In the Brock case the Kansas Supreme Court stated that the Franks and

Atkinson decisions "did not recognize the new concept of controlled access highways. They are contrary to the law as expressed in this opinion, and are therefore overruled." (195 Kan. at page 372). The court specifically rejected its previous reasoning, stating that the Highway Commission could elect to exercise its police power rather than the power of condemnation and upheld the taking of direct access in the Brock case. Upon entry of the Brock opinion, the Kansas Supreme Court in this case asked for new arguments which were held. The pertinent point is that at the time of the original commencement of this action petitioners in the state of Kansas were recognized to have common law property rights protected by specific legislation and long judicially recognized by the Kansas Supreme Court, and at least at that time were property rights which, under the United States Constitution, could not be taken without due process of law and payment of just compensation. By the subsequent decision by the Kansas Supreme Court in this case, however, the court specifically endorsed the proposition that by administrative action without administrative hearing, by the exercise of power rather than right, by trial court judicial fiat without a trial either to a court or a jury, the property rights theretofore recognized could be appropriated without the payment of any compensation.

Justice Schroeder in his dissenting opinion in *Brock* v. *State Highway Commission, supra,* 195 Kan. at page 378, stated:

> "The Kansas legislature in 1953 enacted the controlled access facility statute to enable such highways in Kansas. On a factual situation substantially the same as the instant case, this court in *Franks* v. *State Highway Commission, supra,* in December, 1957, construed the statute for the first time. It was elucidated in

Atkinson v. *State Highway Commission, supra,* and broadened in *Smith* v. *State Highway Commission, supra.* The access the court was speaking of in these cases was direct access to the main traveled portion of the highway. This construction of the statute—mandatorily requiring the acquisition of property rights, including the right of access of an abutting property owner, to establish a controlled access facility—has stood for over seven years and the legislature has not seen fit to change it. *Under these circumstances it must be assumed the legislature has approved such construction placed upon the statute by the court. The authorities on statutory construction so holding are legion.*" (Emphasis supplied).

The Kansas statute, K.S.A. 68-1903, provides as follows:

"Acquisition of property and property rights. The Highway authorities, jointly or severally, may acquire the desired private or public property, including rights of access, light, air or view for controlled access facilities, by gift, devise, purchase or condemnation, in the same manner as now or hereafter authorized by law for acquiring property or property rights in connection with highways, roads and streets within their respective jurisdictions. [L. 1953, ch. 307, § 3; April 2]."

(See remainder of K.S.A. 68-1901 to 1906, inclusive, in Appendix B.)

In dealing with that particular statute the majority of the Kansas Supreme Court in *Brock* v. *State Highway Commission, supra,* 195 Kan. at page 369, stated:

"The appellants vigorously contend that the controlled access facilities statute (K.S.A. 68-1901, et seq.) is a mandatory provision requiring condemnation and payment of damages when access rights are restricted. We do not agree with this construction. The statute in no way attempted to restrict the state's existing right to control access under the police power."

It is to be noted that the Kansas Supreme Court does not say that the State Highway Commission has been given the specific right to exercise its police power without payment of compensation or other specified acquisition. The court could not say this for the reason that the statutes which authorize the setting up of frontage roads and the taking of indirect access provide certain exclusive methods by which this can be accomplished and none of these methods were followed in this particular case.

Thus, we are not dealing here with a clear legislative exercise of the police power as there was in *Ferguson* v. *Skrupa*, 372 U.S. 726, 83 S. Ct. 1028, 10 L. Ed. 2d 93. As the court said there, 372 U.S. at page 728, "Under the system of government created by our constitution it is up to the legislatures, not courts to decide on the wisdom and utility of legislation." In this case the legislature of the State of Kansas has never authorized the exercise of the police power to the exclusion of the methods of acquiring access specifically enumerated in the above cited statute. What the Kansas Highway Commission and the Kansas Supreme Court have done in this case is "substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws," which is exactly what this court said could not be done in *Ferguson* v. *Skrupa*, *supra*.

We do not believe that under these circumstances this court can put its stamp of approval on the action of the Kansas Highway Commission and the Kansas Supreme Court which have attempted to wipe out these petitioners' constitutionally protected rights by setting up the so-called "police power" which has no legislative basis.

III

Apparently the Safety Department of the Kansas Highway Commission made a study and recommendation to support the construction of the frontage road about which petitioners are complaining, but the record does not contain any evidence or indication that, the State Highway Commission itself at any time made any designation of U. S. Highway 54 in the area in question as a limited and controlled access facility. It acted unilaterally without following the procedures required by K.S.A. 68-1902.

Thus, regardless of whether the legislature could authorize exercise of the police power resulting in the denial of direct access to petitioners without compensation and regardless of whether or not the State Highway Commission would have the power to exercise such police power even in the absence of enabling legislation, there is a genuine question under the circumstances of this case as to whether or not the petitioners have been afforded procedural due process. There is no indication in the record here that any type of procedure for a determination of the necessities of the situation and the solutions thereto has been prescribed by the State Highway Commission or that any such procedures have actually been maintained and carried out. Surely the due process clause of the United States Constitution affords these petitioners at least the right to such procedural due process.

Furthermore, as pleaded by the petitioners in their Amendment to Petition, the State Highway Commission was and had been engaged in the process of constructing and maintaining frontage roads on the same highway under substantially identical circumstances proceeding by condemnation and the payment in said cases of just compensation. The Highway Commission, acting in a sum-

mary administrative manner, refused to condemn the rights herein questioned and proceeded to take the petitioners' right of direct access not by condemnation, but by appropriation. The effect of the decision of the Kansas Supreme Court is that the existence of a landowner's rights may be determined by the whim of an administrative agency without any procedure for a determination of the facts and the procedure to be followed.

The parties affected by the determination of an administrative body are entitled to insist upon compliance with the requirements of due process (*Shields* v. *Utah Idaho C. R. Co.*, 305 U.S. 177, 59 S. Ct. 160).

Procedure of administrative tribunals must observe the fundamentals of fair play, which require that interested parties be afforded an opportunity for hearing and that judgment must express a reasoned conclusion (*Federal Communications Com.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 60 S. Ct. 437).

In administrative proceedings of a quasi judicial character the liberty and property of the citizen must be protected by the rudimentary requirements of fair play (*Morgan* v. *United States*, 304 U.S. 1, 58 S. Ct. 773). In the last cited case the court laid down the requirements of administrative procedural due process and the reasons therefor in the following succinct statement:

> "The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the Legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasijudicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,' es-

sential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard.'" (*Morgan* v. *United States*, *supra*, 304 U.S. at pages 14-15, 58 S. Ct. at page 775).

IV

The trial court in this case entered summary judgment solely on the basis of the pleadings in the case and the request for admissions which have been filed by the State Highway Commission and in entering such summary judgment the court made no determination as to whether or not the taking of access was reasonable, but entered a summary judgment which stated in effect that any acts in the control of access is within the police power exercised by the Highway Commission. There was no evidence before the court as to the nature, character, circumstances and terrain of the property or the uses to which it was adaptable. Further, there was no evidence as to what access, if any, would be granted to the main traveled portion of the highway. It was only upon second argument of the case in the Kansas Supreme Court that the points of connection at that time between the frontage road serving petitioners' property and the main traveled portion of the highway were shown. There is no evidence as to whether or not these points of connection will remain on a permanent basis or whether they are merely temporary. In short, there was no evidence on which a court could make any determination as to the extent of taking access rights and the reasonableness thereof. Even assuming the judgment and decision of the trial court and the Supreme Court of the State of Kansas to be correct in holding that this was a proper exercise of the police power, the question of reasonableness still must be determined by the court. The classic statement

of the rule is found in *Lawton* v. *Steele*, 152 U.S. 133, 137, 14 S. Ct. 499, 501, 38 L. Ed. 385:

> "To justify the state in * * * interposing its authority in behalf of the public, it must appear—First, that the interests of the public * * * require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

Citing the above rule, this court in *Goldblatt* v. *Town of Hempstead, New York*, 369 U.S. 590, 82 S. Ct. 987, 8 L. Ed. 2d 130, upheld an ordinance as a valid exercise of the police power of the city, but the court there said:

> "To evaluate its reasonableness we therefore need to know such things as the nature of the menace against which it will protect, the availability and effectiveness of other less drastic protective steps, and the loss which appellants will suffer from the imposition of the ordinance.
>
> "A careful examination of the record reveals a dearth of relevant evidence on these points. One fair inference arising from the evidence is that since a few holes had been burrowed under the fence surrounding the lake it might be attractive and dangerous to children. But there was no indication whether the lake as it stood was an actual danger to the public or whether deepening the lake would increase the danger. In terms of dollars or some other objective standard, there was no showing how much, if any thing, the imposition of the ordinance would cost the appellants. In short, the evidence produced is clearly indecisive on the reasonableness of prohibiting further excavation below the water table."

Thus, this court in the Goldblatt case simply held that upon the evidence adduced in the trial court the exercise of the police power was reasonable.

In the instant case the trial court gave petitioners absolutely no opportunity to be heard on the question of reasonableness. In fact, the trial court's decision appears to hold that as long as the denial of direct access constitutes an exercise of the police power, it makes no difference whether the access remaining to petitioners is reasonable or unreasonable. Consequently, petitioners had no opportunity to present evidence on this question. If this court fails should hold that petitioners' rights under the Constitution of the United States were not improperly taken if the exercise of the police power was reasonable, this court still must reverse this case and send it back to the lower court for a determination of reasonableness. Petitioners have pleaded a damage to their property in the amount of $30,000.00 and the fair inference from the pleadings is that the access remaining to the petitioners is unreasonable under all of the circumstances. There is nothing in the record here to justify the state in imposing its authority without payment of compensation and we respectfully submit that petitioners have been denied the right to trial by jury and due process as guaranteed by the 7th and 14th amendments to the United States Constitution.

CONCLUSION

We respectfully submit that the record in this case squarely presents for determination pressing federal questions which cry out for a hearing and decision by this court. For the reasons set forth above it is respectfully submitted that this petition for certiorari should be granted.

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